IN THE

Supreme Court of the United States

October Term, 1947

No. 139

JOSEPH ESTIN,

Petitioner,

v.

GERTRUDE ESTIN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Statement

Petitioner's summary statement of the case is incomplete. This necessitates a brief additional statement.

The parties to the Action for a Separation on March 16th, 1943, *et seq.*, in the original action which resulted in the judgment of Separation and for alimony for respondent's (plaintiff below) support and maintenance which is the basis for the proceeding which resulted in the money judgment pursuant to Section 1171 B of the New York Civil Practice Act from which judgment the appeals herein have been taken (R. 12-23), entered into an agreement also referred to as a stipulation, by which the petitioner promised and agreed to pay the respondent $180.00 per month for her support and this amount was to be written into a

decree, it entered (R. 25, 28, 33) and the means were in the agreement stipulated for the respondent (plaintiff below) to enforce her rights under the stipulation or under a decree, if entered (R. 28).

This stipulation or agreement was on September 29th, 1943 found as a fact by the Official Referee in the Action for a Separation to be a "Separation Agreement" (R. 127).

On October 11th, 1943, the Supreme Court of New York, Queens County, signed the judgment in the Action for a Separation herein. Therein "the report of the official referee was duly confirmed, ratified and approved in all respects" (R. 128) and thus it was adjudged as a matter of law that the agreement or stipulation above referred to is a Separation Agreement between the parties hereto. The Separation Agreement is referred to as a stipulation in the opinion of Chief Judge Loughran of the Court of Appeals of the State of New York (R. 158) sought to be appealed from. The consideration for the Separation Agreement from the Respondent to the Petitioner was a separate, distinct and valuable consideration, entirely separate and apart from their marital relations and the petitioner's obligation to support his wife (R. 95, 96).

In the divorce action by the petitioner against his wife, the respondent, in Washoe County, Nevada, in May 1924, process was served upon the respondent by publication, pursuant to the provisions of the laws of the State of Nevada (R. 129). The respondent, defendant, in the Nevada divorce action, was never in Nevada, she was not served with process in Nevada and did not enter her appearance personally or by attorney (R. 47, 110, 129, 158).

Argument

I. No Constitutional issue is raised by the petition either in form or in substance.

II. The issue the petitioner attempts to raise has been resolved repeatedly by the decisions of this Honorable Court.

The petitioner on page 3 of his petition and brief herein under "Questions presented", asks:

> "Do the provisions of Art. IV, Section 1, of the United States Constitution require that the State Courts of New York give the same effect to the valid decree obtained by the petitioner in Nevada upon due notice of process served personally on the respondent in New York and not upon the service of process on the respondent within the jurisdiction of the Nevada Court and without her personal appearance in that action, as would be given had the respondent been personally served within the jurisdiction or had appeared in that action?
>
> "Do the decisions of the State Courts of New York made before the decision of this Court in Williams v. North Carolina, 317 U. S. 287, adjudging that the liability of a husband to pay alimony under a separation decree made in a New York Court terminates without qualification when a valid divorce is granted by a Court in any state, fix the law as to such liability in and require it to be applied in this case?"

As to the first question, this Honorable Court has answered it firmly in the negative many times.

No court under our system of jurisprudence has power to render a personal judgment against one who resides beyond the territorial limits of the court upon constructive service upon him in the place of his residence and without

personal service of process upon him within the jurisdiction of the court or after his voluntary appearance. Such action is beyond the jurisdiction of the Court and any judgment so rendered is void and therefore not protected by the full faith and credit clause of the Federal Constitution. The enforcement of such a judgment in another jurisdiction would be deprivation of property without due process of law.

Pennoyer v. *Neff,* 95 U. S. 714;
Williams v. *North Carolina,* 317 U. S. 287 at 293;
D'Arcy v. *Ketchum,* 11 How. 165;
Chase v. *Wetzler,* 225 U. S. 79 at 86;
Bigelow v. *Old Dominion Copper Co.,* 225 U. S. 111 and many other cases.

As pointed out below, the case of *Williams* v. *North Carolina,* 317 U. S. 287, upon which the petitioner relies, in itself makes the distinction of the difference in effect of such a divorce decree, without personal service or appearance of the defendant within the jurisdiction of the Court, in dissolving the marital status and as affecting property rights.

The Court wrote at page 193:

> "Thus we have here no question as to the extra-territorial effect of a divorce decree insofar as it affects property in another state."

As to the second question, the petitioner seeks to create an inference which does not exist. Nowhere does he cite a case, as indeed he cannot, that any New York Court ever adjudged that a judgment and decree of divorce of any state, including New York, which was obtained in an action in which the defendant was not personally served with

process within the jurisdiction of the Court and who did not personally or by attorney appear in the case and place himself within the Court's jurisdiction, had the effect of superceding or annulling or in any way putting an end to the wife's right to collect alimony under a prior Separation judgment.

In the instant case the New York Court of Appeals, and the Courts below, gave full faith and credit to the May 24th, 1945 judgment of divorce of the Nevada Court granted to the Petitioner herein against the Respondent herein (R. 159). They gave it all the faith and credit any Nevada Court could give it. The New York Court has given to it the same full faith and credit which it has in Nevada.

The petitioner's counsel in his brief has not cited one case in which it appears that the Courts of Nevada hold that a divorce granted in that state against an absent wife was held to have cancelled an earlier judgment for alimony awarded to the wife in the state of her domicile.

The case that is cited, *Herrick* v. *Herrick*, 55 Nev. 59, 68, is not in point and does not support petitioner's contention. The *Herrick* case in which Mrs. Herrick appeared personally and contested the divorce action commenced by her husband, held only that the prior separation decree obtained by Mrs. Herrick in a California State Court which had personal jurisdiction of both Mr. and Mrs. Herrick, was not res adjudicata of the facts to be tried in the Nevada divorce court and therefore the Nevada Court was not barred by Art. IV, Sec. 1 of the United States Constitution from trying Mr. Herrick's divorce action and granting to him a divorce. It did not decide and the question was not before the Nevada Court as to the effect of its divorce decree on the California Separation judgment. In any event,

since Mr. and Mrs. Herrick were both in the Nevada Court and within its jurisdiction, the question was not before that court and not decided, as to the effect of a Nevada divorce on a prior Separation judgment and a wife's right to collect alimony thereunder, when the wife was not within the jurisdiction of the Nevada Court and had not been personally served with process within its jurisdiction and had not appeared in Court personally or by attorney, which is the sole question decided by the New York Court of Appeals in the instant case.

They did not cite any such case in their briefs in the Courts below as appears in the opinion of Chief Judge Loughran (R. 162). There is no reason to infer that Mrs. Estin would not have got the same judgment in Nevada as she got in this proceeding in the New York Supreme Court, Queens County.

There is no Federal question involved. No where in his brief does the petitioner's counsel state a single instance or cite a case which shows that the New York Court of Appeals in the instant case has not carefully followed the decisions of this Honorable Court and applied Article IV, Section 1 of the United States Constitution to the facts of this case, as it has been universally applied by this Honorable Court and the highest state Courts in the land.

The petitioner's counsel in his brief has not cited a single case which contravenes or makes an issue with the cases cited by the respondent's counsel herein and has presented no issue or question of law to be decided by this Honorable Court which it has not decided frequently before, adversely to the contentions of the petitioner.

Exactly the same issues presented in the instant case have been on five different occasions determined by this Court adversely to the petitioner's contention.

Barber v. *Barber,* 21 How. (62 U. S.) 582;
Sistare v. *Sistare,* 218 U. S. 1;
Barber, Stella v. *Barber, George,* 323 U. S. 77, 79, 80, 81;
Durlacher v. *Durlacher,* 123 Fed. 2nd 70. Certiorari denied, 315 U. S. 805;
Bassett v. *Bassett,* 141 Fed. 2nd 954. Certiorari denied, 323 U. S. 718.

Barber v. *Barber,* 21 How. (62 U. S.) 582 decided in 1859 has remained unquestioned law in this Honorable Court, being approved fifty years later in *Sistare* v. *Sistare, supra,* and again sanctioned by this Court in denials of writs of certiorari in *Durlacher* v. *Durlacher, supra* and *Bassett* v. *Bassett, supra.*

In the *Barber* case, a husband, against whom a separation judgment was rendered in New York, went to Wisconsin and obtained a default divorce on a ground found to be untrue in the separation action. His wife then sued in a Federal court in Wisconsin to recover alimony due under the separation judgment and the husband relied upon his default divorce. The Court, in affirming the decision below, held that the wife was entitled to maintain the action, and stated, regarding the divorce (p. 588):

> "It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the vinculum of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this Union, or in a Court of the United States, where the defendant may be found,

> or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him."

This decision was followed in *Sistare* v. *Sistare*, 218 U. S. 1, 11-15 (1910) and was cited with approval and followed in *Barber, Stella* v. *Barber, George*, 323 U. S. 77, 80 (1944).

The contention of the husband was also rejected by the Circuit Court of Appeals for the Ninth Circuit in *Durlacher* v. *Durlacher*, 123 Fed. 2nd, 70 (C. C. A. 9th, 1941), cert. den, 315 U. S. 805 (1941). In that case the wife recovered a judgment of separation against her husband in New York in 1934. Later the husband became a resident of Nevada and obtained a default divorce there on constructive service. The wife then sued in the Federal Court in Nevada to recover three unpaid money judgments for unpaid instalments of alimony due under the separation judgment, the first two having accrued before the divorce and the third thereafter. The lower Court permitted recovery of the first two judgments, but held that recovery of the third was barred by the default decree. The latter ruling was unanimously reversed on the ground that the separation judgment was entitled to the same faith and credit to which it was entitled in New York, stating (p. 71):

> "Since the New York Supreme Court had acquired and retained jurisdiction in personam over Simon, he had the right to appear in the action there and plead the fact, for it is but a fact from the standpoint of the New York tribunal, that the Nevada divorce decree had ended the matrimonium and hence the right to maintenance during the separation had terminated.
>
> "Nevertheless in New York, Simon could have brought a suit in which he would have been entitled

to show that the Court had lost jurisdiction in the maintenance proceeding. If successful he could have restrained Helen from procuring execution or suing on her New York judgment in that maintenance proceeding. However, he could not have prevailed in such a separate suit because the divorce decree he would have pleaded as causing the loss of jurisdiction in the maintenance proceeding was obtained without Helen's appearance therein or her presence in Nevada or her service within that State. New York holds invalid a divorce decree so obtained. Hence, in New York, Helen's maintenance judgment was secure from collateral attack and would be given full faith and credit in that jurisdiction.

"Simon contends, however, that such faith and credit should not be given it since the present suit was instituted in Nevada and the Nevada United States District Court was bound to apply the law of the State of Nevada. The Nevada Law was claimed to be that, upon the dissolution of the marital tie, the court in which the prior maintenance proceeding was pending lost jurisdiction to render a judgment for maintenance sums. That is to say, the Nevada Federal Court could refuse to recognize the New York judgment because repugnant to Nevada Law.

"The Supreme Court has repeatedly held that under the full faith and credit clause of the Constitution (extended by the statute to the court below), a judgment of a sister state must be enforced, even though the cause of action upon which the judgment is based is repugnant to the law of the state requested to enforce it."

The above decision was followed and reaffirmed by the same Court on substantially the same facts in the later case of *Bassett* v. *Bassett,* 141 Fed. (2nd) 954 (C. C. A.

9th, 1944) cert. den. 323 U. S. 718 (1944). A husband who was residing with his wife in New York, left the state in August 1943 and became a resident of Nevada. In the same month the wife sued for a separation in New York and later obtained a judgment there awarding alimony. In 1939 the husband obtained a default divorce in Nevada on constructive service and later defaulted in paying alimony under the separation judgment. The wife then sued in the Federal Court in Nevada to recover such instalments. The husband argued that since he had a *bona fide* domicile in Nevada his default divorce was entitled to full faith and credit under *Williams* v. *North Carolina,* 317 U. S. 287 (1942) decided a year earlier, and hence his decree barred recovery under the separation judgment. On this reasoning, the lower Court dismissed the complaint but that ruling was unanimously reversed on the ground that the *Williams* case has nothing to do with such an issue, the Court stating (p. 955):

> "In the case of *Durlacher* v. *Durlacher,* 9 Cir. 123 Fed. 2nd 70, we reviewed the procedure of the New York Court in circumstances substantially identical to those herein and held that since the judgment entered in the New York Court was in all respects a valid judgment, it could not be set aside or affected by a judgment of a court of another state. Counsel argue that the Durlacher case was decided upon the theory of *Haddock* v. *Haddock,* 201 U. S. 562, that the Haddock case was reversed by *Williams* v. *North Carolina,* 317 U. S. 287 and therefore that the Durlacher case is not a precedent upon which a decision in the instant case can be rested.
>
> "We believe that the *Williams* case does not affect the result reached in the *Durlacher* case. The State of New York had acquired jurisdiction over both

parties to this appeal in the original separate maintenance action and, according to its law, retained jurisdiction throughout the proceedings leading to the two judgments questioned herein. In those proceedings William Bassett could have appeared and pleaded any defense that he may have had, but this he failed to do. Had he appeared in the New York proceedings subsequent to the granting of the original decree and been unsuccessful, his recourse would have been in the appellate courts of New York and in the Supreme Court of the United States.

"As here presented we are asked to accept the decree of a Nevada Court which, in effect, attempts to set aside decrees or judgment of a court of New York. This is the point in this appeal and Williams v. North Carolina, supra, has absolutely nothing to do with it."

The refusal of the Supreme Court to review the above decision is significant and would clearly seem to indicate agreement with the reasoning of the Circuit Court of Appeals.

The application for a Writ of Certiorari in the above case of *Bassett* v. *Bassett* was denied in October 1944. Two months later in December 1944, the Supreme Court decided the case of *Barber, Stella* v. *Barber, George,* 323 U. S. 77, *supra,* in which identical facts were in issue and this Honorable Court in its decision cited and followed the same cases and precedents as were cited and followed in the *Durlacher* and *Bassett* cases and in the instant case. Constant iteration and reiteration of the same law and cases is not called for every time such a matrimonial action is carried to the Court of last resort of a state. No different or novel aspect of the problem is presented by the petitioner here.

The petitioner in his brief in paragraph 4 on page 5, seizes upon dicta in the closing lines of the last paragraph of the Opinion of the New York Court of Appeals, "Consequently as we shall assume, the common law of Nevada does not differ in that regard from the common law of New York", to build a straw man to put forth the fallacious and baseless proposition that "the Common Law of New York is that the duty of a husband to support his wife terminates when the relation of husband and wife ends", and so the petitioner hopes to create the erroneous impression that the decision of the New York Court of Appeals in the instant case is contrary to the common law and thus presents a new and different aspect of the point definitely decided by the above cited cases and therefore should be reviewed.

The decision of the New York Court of Appeals herein is not in conflict with the common law or any common law rights of the petitioner.

There is no common law of divorce in New York State. Divorce and Separation in New York are wholly statutory.

> *Borenstein* v. *Borenstein,* 270 N. Y. Sup. 688, judgment affirmed 272 N. Y. 407.

The Courts of New York have no common law jurisdiction over the subject of divorce and their authority is confined altogether to the exercise of such incidental powers as are conferred by statute and beyond the limits prescribed by statute the court has no power to go. Aside from the statute no New York Court has power to decree an absolute divorce or a separation and alimony. Neither the Common Law Courts nor the Court of Chancery in England have ever possessed that power. Hence the courts here never succeeded to it. They can exercise no power on the

subject of divorce except what is expressly specified in the statute.

Peuguet v. *Phelps,* 48 Barb. 566;
Galusha v. *Galusha,* 43 Hun. 181;
Erkenbrach v. *Erkenbrach,* 96 N. Y. 456;
Romaine v. *Chauncey,* 129 N. Y. 566 at 571;
Cotter v. *Cotter* (1906), 225 Fed. 471.

In New York State and all across the country thousands of men are paying alimony to support their ex-wives pursuant to divorce decrees granted by courts of competent jurisdiction; and that not because of a supposed punishment for a wrong done by the husband to the injured wife.

In an annulment case, where there is no fault in either party, the husband may be required to pay money to support his ex-wife.

> "Where an action is brought to annul a marriage or to declare the nullity of a void marriage, the court may give such direction for support of the wife by the husband as justice requires. * * * This section shall apply to any action brought by either the husband or the wife or by any other person in the lifetime of both parties to the marriage." (1940)

Section 1140—a *New York Civil Practice Act.*

Anonymous v. *Anonymous* (1940), 174 Misc. 496;
Frankel v. *Frankel* (1941), 262 App. Div. 770;
Cohen v. *Cohen* (1941), 262 App. Div. 765.

Under the law of New York it appears, indeed, as if a man may be required to support two wives.

Krauss v. *Krauss,* 282 N. Y. 355.

In the above *Krauss* case it appears to be a moot question, which, if either, of the two women involved was the ex-wife.

Thus it is seen that the petitioner's contention that a husband cannot be compelled to support an ex-wife is reduced to a *reductio ad absurdam.*

The respondent has vested property rights to the alimony awarded by her separation decree as to past due instalments.

The New York Court of Appeals in its Opinion (R. 162) cited *Livingston* v. *Livingston,* 173 N. Y. 377. Petitioner's counsel, on page 6 of his brief, writes "this is clearly a mistake" and cites the later case of *Karlin* v. *Karlin,* 280 N. Y. 32. In the *Karlin* case the New York Court of Appeals distinguishes the case of *Livingston* v. *Livingston, supra,* but did not reverse it. In the *Karlin* case the New York Court of Appeals held that the case of *Livingston* v. *Livingston, supra,* was not in point to maintain the argument that the Supreme Court of New York had not power under an amendment to Section 1170 of the Civil Practice Act of New York, to modify the alimony provisions in a divorce decree after the entry of final judgment, inasmuch as the amendment was added to the statute after the decision of *Livingston* v. *Livingston, supra.*

After the passage of the amendment by the New York Legislature, the New York Court of Appeals again, in the case of

Harris v. *Harris,* 259 N. Y. 334, 337

pronounced the same determination of New York Law as it pronounced in the present case. In its opinion the Court wrote:

> "These past due sums have become vested rights of property in the plaintiff which the Supreme Court has no right to take from her."

Later the New York Court of Appeals, and after the decision of the *Karlin* case in 1939, *supra,* in the case of

Waddy v. *Waddy* (1943), 290 N. Y. 247

held that:

> "Chapter 161 of the laws of 1938 amending present section 1172-c of the Civil Practice Act so as to provide, in substance, that the court may annul provisions in a final judgment directing payment of money in support of a wife, is not retrospective and the Supreme Court has not power under such amendment, to annul the provisions in a final judgment directing payment of money to support a wife, where the wife is habitually living with one not her husband and holding herself out as his wife.
>
> "Even though the legislature had indicated by express declaration its intent that the Act should have retroactive application, it would not be effective as to decrees entered prior to the date it went into effect since the right of the wife to alimony *became a vested property right upon the entry of the judgment and could not be affected by subsequent legislation.*
>
> "The Court was not entitled in its sound discretion to modify the alimony provisions under Section 1170 of the Civil Practice Act since that section does not authorize annulment of the alimony provisions for misconduct of wife."

To the same effect is the opinion of the Court of Appeals in

Hayes v. *Hayes,* 220 N. Y. 596.

So, in the present case, the New York Supreme Court did not have power to modify the alimony provisions of

the Separation judgment herein, under sections 1165 and 1170 of the Civil Practice Act of New York because the reason given for asking the modification, in the defendant's motion herein for that relief (R. 105, 112, 114), to wit his Nevada divorce judgment, is not one of the grounds for annulment or modification of a Separation provided in sections 1165 and 1170 of the New York Civil Practice Act, which are the statutes which apply.

Gewirtz v. *Gewirtz,* 189 App. Div.

In this case the Court held:

> "The Separation decree continues in full force and effect so long as no order revoking the decree was made pursuant to section 1767 of the Code of Civil Procedure (now Section 1165 of the Civil Practice Act) which section provides the exclusive method of revoking or terminating a decree of separation."

It is the settled law of New York that the only method by which a decree of separation can be revoked is today as above decided by the Appellate Division of the Supreme Court and it can be done only in an appropriate proceeding brought for that purpose strictly within the terms of the statute.

Sistare v. *Sistare,* 218 U. S. 1 (*supra*).

In this respect the Opinion of the New York Court of Appeals herein is exactly in line with the reasoning and analysis of New York Law as contained in the opinions of the United States Circuit Court of Appeals for the Ninth Circuit in the above cited cases of *Durlacher* v. *Durlacher, supra,* and *Bassett* v. *Bassett, supra.* In the *Durlacher* and *Bassett* cases the Court held that Messrs. Durlacher and Bassett could have appeared in the New York Courts

and interposed any defense they had to their respective wives motions for judgment and not having done so the New York judgments for arrears of alimony were final and could not be collaterally attacked. Here the petitioner came into court at the inception of the proceedings for a money judgment and interposed the best and only defense he has—his Nevada divorce. Under the New York statute this is not one of the grounds given for annulling or modifying a Separation judgment and the Court has no discretion to go outside the limits set by the statute.

The question sought to be raised involves the substantive law of the State of New York regarding the duty of a man to support his wife and the New York Court of Appeals has stated the New York law and decided the question in the instant case and in

> *Kreiger* v. *Kreiger,* 61 N. Y. S. 2nd 665 (Sup. Ct. N. Y. Co. 1946) aff'd 271 App. Div. 872 (1946); affirmed N. Y. Ct. of Appeals (1947). New York Law Journal, July 7th, 1947.

The doctrine laid down by the Court of Appeals is in accord with sound public policy.

Recent decisions of the Federal Courts are in accord with the Opinion of the New York Court of Appeals. In

> *Gray* v. *Gray,* 61 Fed. Supp. 367 (E. D. Mich. 1945)

a husband avoided service in his wife's separation action by going to Nevada where he obtained a default divorce. He later returned, the wife recovered a separation judgment awarding alimony, and when he refused to pay she obtained a contempt order. He then sued in the Federal Court for an injunction to prevent the enforcement of the contempt order on the theory that his Nevada decree was

a bar. His contention was rejected in an opinion stating that the *Williams* case distinguishes between marital status and property rights and that the Nevada divorce did not prevent enforcement of the separation judgment.

The courts of other jurisdictions have refused to nullify a wife's rights to alimony under a judgment because of a foreign divorce. *Manney* v. *Manney,*—Ohio—59 N. E. 2nd 755 (1944); *Price* v. *Ruggles,* 244 Wis. 187; 11 N. W. 2nd 513 (1943); *Bennett* v. *Tomlinson,* 206 Iowa 1075, 221 N. W. 837 (1928); *Simonton* v. *Simonton,* 40 Idaho 751, 236 Pac. 863 (1925) annotated 42 A. L. R. 1375; *Van Ingwagen* v. *Van Ingwagen,* 86 Mich. 333, 49 N. W. 154; *Wagster* v. *Wagster* (Arkansas), 103 S. W. 2nd 639; *Bolton* v. *Bolton,* 86 N. J. L. 626, 92 Atl. 391; *Bennett* v. *Bennett,* 63 N. J. Eq. 308; *Arrington* v. *Arrington,* 127 N. C. 195; *Chappel* v. *Chappel,* 86 Md. 543; *Rogers* v. *Rogers,* 46 Ind. App. 509, 89 N. E. 903, 92 N. E. 664.

Within the last few weeks two cases have been decided in the Federal Courts in the Southern District of New York, or rather one case decided in the District Court on May 28th, 1947 and the judgment in the same case affirmed on Appeal in the United States Circuit Court of Appeals, Second Circuit on July 1st, 1947. In

> *Security Trust Co. of Rochester, N. Y.* v. *Woodward and Woodward,* District Court of the United States, So. Dis. of New York, John Bright, J.,

Mr. and Mrs. Woodward lived and married in New York. They separated and Mrs. Woodward sued in New York for a separation and support for herself and minor son. Mr. Woodward was served personally in New York and

appeared and contested the action. Judgment of separation and custody of the minor son was granted to Mrs. Woodward and she was awarded substantial alimony for the support of herself and her son. Mr. Woodward went to Nevada and stayed there sufficient time to acquire a domicile and commenced an action for divorce there against his wife in New York. Mrs. Woodward was not in Nevada, was not served personally within the jurisdiction of the Nevada Court and did not voluntarily place herself within its jurisdiction by appearance in person or by attorney. Woodward removed all his property and possessions out of the State of New York except the trust funds in the bank of the plaintiff, The Security Trust Co. of Rochester, N. Y., which trust had been sequestered in proceedings started in the Supreme Court of the State of New York to collect her alimony. Woodward undertook to stop the payment to her. The Trust Company interpleaded both Mr. and Mrs. Woodward in the action brought in the United States District Court for the So. Dist. of N. Y. Mr. Woodward set up the claim that his Nevada divorce superceded and annulled Mrs. Woodward's Separation judgment and was a bar to her collecting any more alimony from the plaintiff, Trust Co.

On the above facts Judge Bright of the U. S. Dist. Ct. rejected the husband's contention as unsound and held that the wife was entitled to summary judgment awarding to her the funds on deposit in the action and entitling her to continue to receive support under the separation judgment regardless of the status of the Nevada divorce as such. His opinion, dated May 20, 1947 shows that the law is clear and admits of no doubt, stating:

> "As the provisions in New York for alimony were *in personam,* that portion of the Nevada decree *in rem* did not affect or abrogate the alimony provisions in the New York judgment. The Nevada court did not have jurisdiction of Mrs. Woodward *in personam;* she was not served with process in Nevada; she did not submit to jurisdiction there; and her property rights, established by a valid judgment (to which also full faith and credit must be accorded), were not affected."

Mr. Woodward appealed and the Circuit Court of Appeals, 2nd Circuit consented to hear the appeal without delay on the typewritten record. On July 1st, 1947 the ruling of Judge Bright was unanimously affirmed in a decision reading as follows:

> "PER CURIAM: Affirmed on the authority of *Esenwein* v. *Esenwein,* 325 U. S. 279; *Estin* v. *Estin,* 296 N. Y. 308; and *Bassett* v. *Bassett,* 141 Fed. 2nd, 954 (C. C. A. 9)."

Significantly, the decision of the U. S. Cir. Ct. of Appeals, 2nd Cir. above, cites as authority for affirmance the very case upon which the petitioner places principle reliance in his brief on this application (*Esenwein* v. *Commonwealth of Pa. ex rel. Esenwein,* 325 U. S. 279).

On July 15th, 1947, the U. S. Cir. Ct. of Appeals denied Mr. Woodward's motion for a stay pending an application for a writ of certiorari.*

The impression which petitioner's counsel seeks to create, that the opinion of the New York Court of Appeals makes a distinction between the decisions of this Honorable

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* On July 21st, 1947, Mr. Justice Jackson of the United States Supreme Court also denied Mr. Woodward's motion for a stay.

Court in the case of *Esenwein* v. *Commonwealth of Pa., etc., supra,* and that of *Barber* v. *Barber,* 21 How. 582, is entirely erroneous.

The *Esenwein* case decides one point only and that is that the Nevada divorce obtained by Esenwein was invalid, void, because his purported domicile in Nevada was sham and a fraud on the Nevada Court and therefore the Nevada State Court had no jurisdiction to grant him the divorce, and so this Honorable Court affirmed the judgment of the Supreme Court of Pennsylvania, that the Nevada Court was without jurisdiction to grant Esenwein a divorce and it was therefore invalid to affect Mrs. Esenwein's support order. The decisions in the *Esenwein* case turned on the decision of this Honorable Court in the second *Williams* appeal, 325 U. S. 226, which was decided the same day the *Esenwein* case was decided, whereas the decisions of the Courts below as well as the Opinion of the New York Court of Appeals in the instant case, turn on the decision of this Honorable Court in the first *Williams* appeal, 317 U. S. 287.

The decisions of the above cited Federal Courts in a case, which is entirely similar to this *Estin* case and which support and follow the opinion of the New York Court of Appeals and also cite and follow the *Esenwein* case show the agreement in the thinking of those judges and the judges of the New York Court of Appeals about the *Esenwein* case.

The right of the respondent, Mrs. Estin to collect her alimony from the petitioner, her husband, is a contract right, the amounts stipulated in the separation agreement before referred to and which is the basis for the amount of alimony written into the Separation judgment, and

this contract right is not affected by Mr. Estin's Nevada divorce decree.

No power resides in the Court to alter a valid agreement as between the parties who made it and who may declare upon it for relief as upon any other contract.

> *Schnitzer* v. *Buerger,* 236 App. Div. 625;
> *Hamlin* v. *Hamlin,* 224 App. Div. 168.

The validity of the stipulation cannot be questioned and the court cannot make other provisions until the agreement is set aside by Court action for adequate reasons.

> *Braunsworth* v. *Braunsworth,* 260 App. Div. 625;
> *Goldman* v. *Goldman,* 282 N. Y. 296.

A judgment for alimony is a debt—and more than an ordinary one.

> *Barber* v. *Barber,* 217 N. C. 422, 428.

The above cited decision of the North Carolina Supreme Court is the decision which was appealed from and affirmed by this Honorable Court in the heretofore cited case of *Barber, Stella* v. *Barber, George,* 323 U. S. 70, *supra.*

A judgment is the highest form of specialty. It is a debt.

The amount due to the plaintiff, respondent herein, is a judgment (arrears due on payments for support) and it is in the nature of a judgment debt for it is a sum which the court has directed the defendant to pay. It is a judgment which may be enforced by execution.

> *Thayer* v. *Thayer,* 145 App. Div. 269;
> *Miller* v. *Miller,* 7 Hun. 208.

The cases cited by petitioner's counsel in his brief on page 8 thereof do not support his contention that "alimony is

not a debt and are not at all in point." In not one of the cases that he cites does the court hold that a judgment for alimony is not a debt. The cases cited by the petitioner's counsel in his brief on page 6, that "the duty of a husband to support his wife terminates when the relation of husband and wife ends", do not at all support his contention and are not in point. None of the cases cited in the petitioner's brief support his claim for a Writ of Certiorari.

The statement on page 6 of petitioner's brief in the fifth paragraph, "The only provisions in New York for such support (of ex-wife) are Section 1155 of the Civil Practice Act * * *, and Section 7.5 of the Domestic Relations law * * *," is fallacious and not at all a correct statement of New York Statute law on the subject.

The authority and power of the New York Supreme Court to grant the Respondent, Mrs. Estin, a judgment for a Separation and alimony is given by Sections 1161 and 1164 of the Civil Practice Act.

Power and authority is given to the New York Supreme Court to grant permanent alimony in a final judgment to ex-wives, other than those divorced at their own suit, in Section 1140-a. The New York statutory law of divorce and alimony have nothing at all to do with the question at issue in this application.

The petitioner's Nevada divorce is simply an incident which the overwhelming weight of authority holds does not affect or nullify Mrs. Estin's prior New York judgment for separation and alimony, which is a property right.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a Writ of Certiorari in this case should

be denied. The petition presents no question of merit to be adjudicated by this Honorable Court adversely to the respondent's contention, not only in cases directly in point and decisive of the issues here presented, but in other cases where the principles of law enunciated by this Honorable Court are controlling from other view points and such decisions are squarely adverse to the contentions of the petitioner.

Wherefore, respondent prays that the petition for a Writ of Certiorari be denied.

Dated New York, N. Y., July 28th, 1947.

Respectfully submitted,

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Attorney for Respondent.

JOSEPH N. SCHULTZ,
of Counsel.